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No. 85-332

In the Supreme Court of the United States

OCTOBER TERM, 1985

PARISH OF ST. BERNARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, the Parish of Jefferson, Louisiana, and the Jefferson Parish Council,[1] seek review of the court of appeals' decision remanding this case to the district court to allow the United States to proceed on subrogation and possible other claims under state law arising out of flood insurance policies issued by the federal government.

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[1] The other defendants in these consolidated cases have not petitioned for certiorari.

1. a. Petitioners voluntarily participate in the National Flood Insurance Program (NFIP) pursuant to the National Flood Control Act, 42 U.S.C. 4001 *et seq.* By virtue of their participation, several thousand property owners in the Parish became eligible for federal flood insurance.

Following severe floods in 1978, 1980, and 1982, the United States paid millions of dollars in insurance claims to persons in the Parish covered by NFIP policies. Thereafter, the United States filed actions in the United States District Court for the Eastern District of Louisiana to obtain damages and injunctive relief against the Parish and other defendants. The government alleged that the failure of the Parish and other defendants to implement various flood control measures, contrary to their obligations under the NFIP, had proximately caused the flood damage. The United States advanced several theories of liability based on contractual rights against the parishes, an implied right of action under the National Flood Control Act, a right of subrogation to the claims that the insurance holders would have against the defendants under state law, and other state common law grounds.

b. The district court granted in part and denied in part the defendants' motions to dismiss or for summary judgment, and it entered a final judgment on the dismissed claims pursuant to Fed. R. Civ. P. 54(b). With respect to the government's subrogation and state common law claims, the court rejected the defendants' contentions, concluding that these theories presented valid causes of action (Pet. App. A37, A42-A48).[2]

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[2] The district court did rule against the government's public nuisance claim (Pet. App. A48-A57), and the government later abandoned the issue (*id.* at A3, A4).

c. The government appealed from the final judgment dismissing certain of its claims, and the Parish took an interlocutory appeal pursuant to 28 U.S.C. 1292(b) from the portion of the district court's order declining to dismiss the subrogation and common law claims. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A31). The court first held that the government had no contractual or implied statutory rights against the defendants (*id.* at A8-A14). With respect to the issue before this Court, the court of appeals held that the United States has a subrogation claim to the extent permitted by state law. In addition, the court ruled that other causes of action might be available to the government insofar as they are allowed under state common law, and it left the development of these remedies to further proceedings in the district court. *Id.* at A3, A15-A26; *id.* at A26 (Williams, J., concurring in part and dissenting in part).

2. The decision of the court of appeals is interlocutory and does not represent a complete adjudication of petitioners' liability. Moreover, the ruling below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

a. As explained above, the district court rejected petitioners' argument that the United States does not have valid subrogation and other state common law claims, and the court of appeals granted interlocutory review of that ruling pursuant to 28 U.S.C. 1292(b). Thus, there has been no final judgment adjudicating petitioners' liability, if any, to the United States. Indeed, the court of appeals held only that the National Flood Control Act does not preclude the government's subrogation claim and that

such a claim is available under the NFIP to the extent permitted by Louisiana law; the ultimate determination of liability will therefore depend upon the resolution of numerous issues of state and perhaps federal law that have not yet been considered. If petitioners prevail in further proceedings in the district court, their contention in the petition will be moot. Conversely, if petitioners are eventually found to be liable and that judgment is affirmed on appeal, petitioners will be able to present to this Court the argument they now raise, together with any others they may have, in a petition for a writ of certiorari seeking review of a final judgment against them.

In addition, the court of appeals recognized that claims other than subrogation might be available to the United States under state common law but that no definite decision could be made "at this early stage of litigation" (Pet. App. A25). While petitioners challenge the court of appeals' ruling on the subrogation issue, they do not address these other state law claims. Thus, the question presented by petitioners would not in any event dispose of this case.

In these circumstances, review of the court of appeals' decision would be premature at this time.

b. At all events, petitioners' argument is without merit. Relying on *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), petitioners contend (Pet. 7) that specific statutory authority is necessary for the United States to assert a common law right such as subrogation. However, it is well settled that the United States has the inherent authority to invoke common law remedies. See, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *United States* v. *Tingey*, 30 U.S. (5 Pet.) 115, 127-128 (1831);

United States v. *Marion County School District*, 625 F.2d 607, 611 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981). Indeed, *Standard Oil* itself seemingly recognized that right (332 U.S. at 306-307), although it declined, in the face of federal statutes addressing related situations, to extend the federal common law to provide the particular cause of action at issue. See *id.* at 315-316 & n.22.

This authority of the government is especially appropriate in the circumstances of the present case. As the court of appeals explained (Pet. App. A16-A17), the United States is acting as an insurer here, and the subrogation rights it seeks to invoke are no different from those available to private insurers under the same circumstances. The government has simply taken over the insurance function performed by private insurers in the early years of the NFIP, and there is no reason why basic insurance principles should not continue to be effective. Furthermore, the standard insurance contract used for policies issued by the government, which was promulgated as part of the regulations of the administering agency (see 44 C.F.R. Pt. 61 App. A; Pet. App. A127), has long included a subrogation clause typical of those in private insurance contracts; this clause expressly allows the government, in the event of payment of a claim, to stand in the shoes of the claimant to enforce any legal rights the claimant may have against others in connection with the loss. Thus, the United States simply seeks to enforce common law rights that would be available to a private party engaged in the same activity. See *Industrial Indem. Ins. Co.* v. *United States*, 757 F.2d 982 (9th Cir. 1985); *United States* v. *Bender Welding & Machine Co.*, 558 F.2d 761 (5th Cir. 1977).

In addition, even if statutory authorization were necessary for the government to invoke a subrogation right, that requirement would be satisfied here. As noted by the court below, the National Flood Insurance Program was " 'designed to operate much like any other private insurance company,' " and the National Flood Control Act establishing the program makes " 'clear that Congress did not intend to abrogate standard insurance law principles' " (Pet. App. A16 (emphasis omitted), quoting *Drewett* v. *Aetna Casualty & Surety Co.*, 539 F.2d 496, 498 (5th Cir. 1976)). See also Pet. App. A9 (citation omitted) (issues concerning NFIP "are resolved under federal law 'by drawing upon standard insurance law principles' "). In accord with these principles, and pursuant to the authority that "Congress delegated to the agency * * * for writing the regulations under which the NFIP would operate" (Pet. App. A17), the agency administering the NFIP has adopted a regulation providing for a subrogation clause in the insurance policies issued by the government (see page 5, *supra*). This provision is, as the court of appeals correctly concluded, "within the framework contemplated by Congress" (*id.* at A21).

Petitioners argue (Pet. 8-10) that, under *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), Congress must specifically create a cause of action for subrogation if one is to exist. This argument is misconceived. The cited cases involve the question whether a contractual or implied statutory cause of action has been created by Congress, and the court of appeals relied on those decisions in finding that no contractual or implied statutory right is available to the government in this

case (Pet. App. 9a-13a). However, as the decision below reflects, they do not bear on the distinct question of a subrogation remedy. That remedy is not a contractual or direct action created by federal statute. Rather, the underlying claim of the property owners against petitioners is created by state law, and the right to enforce that claim is transferred from the federally insured property owners to the United States under conventional subrogation principles.[3] No new liability is created, and the cases cited by petitioners, regarding the standards for determining whether Congress intended to establish new causes of action, are inapposite.[4]

Nor, contrary to petitioners' assertion (Pet. 8), does the National Flood Control Act preempt a common law subrogation remedy under *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). Petitioners have pointed to no reason to assume that Congress, in establishing a statutory program for the federal government to engage in the business of insurance, intended to deprive the government of the ability to protect the public fisc under established principles of insurance law. The only remedies specifically pro-

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[3] This analysis also disposes of petitioners' contention that imposition of liability under a subrogation theory would be "unconscionable" (Pet. 10-12). Petitioners' liability to the government will be no greater under this theory than the liability they would have had in any event, under state law, to the individual property holders harmed by the Parish's wrongful conduct.

[4] In addition, unlike the situation in *Pennhurst*, petitioners were well aware of the obligations imposed on them by their agreement to participate in the NFIP. See Pet. App. A28-A29 (Williams, J., concurring in part and dissenting in part); compare Pet. App. A10.

vided in the statute, which involve actions on insurance claims against the government or private insurers (42 U.S.C. 4053, 4072), plainly do not "speak directly" (*City of Milwaukee*, 451 U.S. at 315) to the availability of a subrogation right by the insurer against the responsibile tortfeasor. The other provision cited by petitioner, which authorizes a noncomplying locality to be suspended from the flood insurance program, is not contained in the statute but instead was established by administrative regulation (see 44 C.F.R. 59.24), and thus it affords no basis to infer that Congress intended to displace the traditional right of subrogation as an available remedy to protect the government's financial interest in the program.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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